Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

No. 94-1966

In the

Supreme Court of the United States

October Term, 1995

DWIGHT J. LOVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF PUBLIC CITIZEN, INC, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
1600 Twentieth Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Eugene R. Fidell
Feldesman, Tucker, Leifer,
Fidell & Bank
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

Attorneys for *Amicus Curiae*
Public Citizen, Inc.

QUESTION PRESENTED*

Did the Court of Military Appeals err in upholding the issuance by the President of the constitutionally-necessary aggravating factors for death penalty offenses in the military where (a) the court found only an implicit delegation of that power by Congress; (b) the court was unable to point to any explicit statutory language establishing any intelligible principles to guide the President's discretion; and (c) the delegation, if sustained, would unite in the President the power to make and execute the laws, as well as to assign and remove the military judges hearing the case?

* This question is a slightly restated version of Questions 1, 2, & 3 on which the Court granted review. The principal change is that the first question in the petition has been moved to the end.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICUS* 1

STATEMENT OF THE CASE 1

A. *The Death Penalty in the Armed Forces* 2

B. *The Curtis Decisions* 5

SUMMARY OF ARGUMENT 7

ARGUMENT

THE DEATH PENALTY IMPOSED ON PETITIONER MUST BE SET ASIDE 9

I. THE PRESIDENT LACKS THE STATUTORY AUTHORITY TO PROMULGATE AGGRAVATING FACTORS FOR CRIMES COMMITTED BY SERVICE MEMBERS OTHER THAN THE CRIME OF ESPIONAGE 9

II. ANY DELEGATION HERE VIOLATES THE NON-DELEGATION DOCTRINE 21

III. THE DELEGATION ALSO VIOLATES SEPARATION OF POWERS 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **PAGE**

Bowsher v. Synar, 478 U.S. 714 (1986) 1

Buckley v. Valeo, 424 U.S. 1 (1976) 26

Furman v. Georgia, 408 U.S. 238 (1972) . . . 2, *passim*

Gregg v. Georgia, 428 U.S. 153 (1976) 2

Immigration & Naturalization Service v. Chadha,
462 U.S. 919 (1983) 1, 11

J.W. Hampton, Jr., & Co. v. United States,
276 U.S. 394 (1928) 21

Johnson v. Transportation Agency,
480 U.S. 616 (1987) 11

Maynard v. Cartwright, 486 U.S. 356 (1988) 3

Mistretta v. United States,
488 U.S. 361 (1989) . . . . . 1, *passim*

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 10

Reid v. Covert, 354 U.S. 1 (1957) 26

Rust v. Sullivan, 500 U.S. 173 (1991) 28

Solario v. United States, 483 U.S. 435 (1987) 20

Touby v. United States, 500 U.S. 160 (1991) 22

Train v. City of New York, 420 U.S. 35 (1975) 19

Trop v. Dulles, 356 U.S. 86 (1958) 27

United States v. Brown, 381 U.S. 437 (1965) 27

United States v. Curtis,
28 M.J. 1074 (N.M.C.M.R. 1989) 5

United States v. Curtis,
32 M.J. 252 (C.M.A.),
cert. denied, 502 U.S. 952 (1991) . . . . . 2, *passim*

United States v. Frederick,
3 M.J. 230 (C.M.A. 1977) 14

United States v. Harper,
729 F.2d 1216 (9th Cir. 1984) 13, 24, 27

United States v. Matthews,
16 M.J. 354 (C.M.A. 1983) 3, 10

United States v. Ware, 1 M.J. 282 (C.M.A. 1976) . . . 14

United States v. Woolard,
981 F.2d 756, *reh. denied*,
990 F.2d 820 (5th Cir. 1993) 10, 13-14, 27

Weiss v. United States, 114 S. Ct. 752 (1994) 1, 27

Woodson v. North Carolina, 428 U.S. 280 (1976) . . . 16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 6

CONSTITUTION AND STATUTES

U. S. Constitution, Art. I, § 8, cl. 14. . . . . 4, 28

U.S. Constitution, Art. II, § 2, cl. 1 . . . . . 4, 28

Pub. L. No. 96-107, 93 Stat. 811 (1979) 14

Pub. L. No. 99-145, § 534(a), 99 Stat. 634 (1985) . . . 6

Uniform Code of Military Justice

Article 18, 10 U.S.C. § 818 . . . . . 4, *passim*
Article 36, 10 U.S.C. § 836 . . . . . 4, *passim*
Article 50a, 10 U.S.C. § 850a 14
Article 56, 10 U.S.C. § 856 . . . . . 4, *passim*
Article 71(a), 10 U.S.C. § 871(a) . . 16, 17, 26, 28
Article 106, 10 U.S.C. § 906 17
Article 106a, 10 U.S.C. § 906a 5
Article 118(1), 10 U.S.C. § 918(1) 2, 10, 18
Article 118(4), 10 U.S.C. § 918(4) 2, 10, 18

18 U.S.C. § 3592 . . . . . 12, 25

49 U.S.C. § 1473 12

LEGISLATIVE MATERIALS

Establishing Constitutional Procedures for the Imposition of Capital Punishment, S. Rep. No. 282, 99th Cong., 2d Sess. (1986) 12

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. (1985) 19

H.R. Rep. No. 98-1017, 98th Cong., 2d Sess. (1984) . 26

S. Rep. No. 197, 96th Cong., 1st Sess. (1979) 14

S. Rep. No. 53, 98th Cong., 1st Sess. (1983) 17

S. Rep. No. 98-225, 98th Cong., 1st Sess. (1983) . . . 28

MISCELLANEOUS

Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984) . . . 3

Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984) . . 3

The Federalist No. 62 (C.Rossiter ed. 1961) 10, 28

Manual for Courts-Martial, Rule 1004 . . . . . *passim*

No. 94-1966

In the

Supreme Court of the United States

October Term, 1995

DWIGHT J. LOVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PUBLIC CITIZEN, INC, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *THE AMICUS*

Public Citizen, Inc. is a nonprofit organization with approximately 100,000 members. Through its Litigation Group, it has been lead counsel in many of this Court's leading separation of powers cases, such as *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Mistretta v. United States*, 488 U.S. 361 (1989), and *Weiss v. United States*, 114 S. Ct. 752 (1994). Like its brief in support of the petition in this case, this brief is being filed, with the written consents of the parties, because of Public Citizen's longstanding commitment to principles of separation of powers, which it believes were disregarded by the Court of Military Appeals.

STATEMENT OF THE CASE

Petitioner, an Army private, was convicted by a court-martial of having committed two murders, as well as several other crimes. Both victims were taxi drivers; one

ride that began in Killeen, Texas, and the other occurred in Killeen, but began at Fort Hood.

Articles 118(1) and 118(4) of the Uniform Code of Military Justice, 10 U.S.C. § 918(1) and § 918(4) ("UCMJ"), authorize the death penalty for premeditated and felony murders, and the court-martial imposed it. Petitioner's death sentence was upheld by the lower courts over numerous objections, including that the President lacks the authority, under both the applicable statutes and the Constitution, to prescribe the aggravating factors that are a constitutional prerequisite for the imposition of any death penalty.

To clarify the issues relating to the power of the President, it is necessary first to review certain death penalty decisions of this Court and the Court of Military Appeals ("COMA"). Because the court below refused to reconsider its prior opinion dealing with those issues, *United States v. Curtis*, 32 M.J. 252 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991), we will then discuss *Curtis*, which is, for all practical purposes, the decision under review here.

A. The Death Penalty in the Armed Forces

In 1972, this Court ruled in *Furman v. Georgia*, 408 U.S. 238, that the death penalty imposed in that case was unconstitutional. Although there were nine separate opinions, it was nevertheless clear that there was agreement on the principle that the broad discretion of a judge or jury to impose death was constitutionally unacceptable and had to be narrowed. Accordingly, in the first post-*Furman* case to uphold a death penalty, *Gregg v. Georgia*, 428 U.S. 153, 192 (1976), the Court based its affirmance on the fact that the applicable statutes ensured that the sentencer would be "given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision" (Joint Opinion of Justices Stewart, Powell, and Stevens). *See also*

Opinion of Justice White, joined by Chief Justice Burger and Justice Rehnquist, *id.* at 222. Although *Furman* was a state court case, the opinions contained numerous references to its applicability to the federal government and in particular to the UCMJ. 408 U.S. at 307, 314, 341, 400, 412, 417-18, and 431.

Since that time, this Court has generally accepted the judgments of the state legislatures that have attempted to limit the discretion of juries, but in doing so it has repeated the core holding of *Furman* — that the state must narrow the categories of cases in which the sentencing authority may impose the death penalty. As the Court stated in *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988), "[s]ince *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Finally, in 1983 COMA ruled that courts-martial could not impose death sentences because the military justice system failed to require that the sentencing authority "make specific findings as to individualized aggravating circumstances." *United States v. Matthews*, 16 M.J. 354, 380 (1983). Although not necessary to its decision, *Matthews* suggested that the gap could be filled either by Congress or the President. *Id.* at 380-81.

President Reagan did not wait for Congress, but instead issued an Executive Order in January 1984 that amended the 1969 Manual for Courts-Martial by including for the first time a capital sentencing rule that sets forth specific aggravating factors for military death penalty offenses. Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). In August 1984, when the current Manual came into effect, Executive Order 12,460 was rescinded, and the capital sentencing scheme was incorporated in Rule for Courts-Martial 1004. Manual for Courts-Martial, 1984, Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984), quoted at Pet. App. at 354a-360a.

As authority for Rule 1004, the President cited only the Constitution and Chapter 47 of Title 10, which is the entire UCMJ that was enacted in 1950. In addition, the drafters of the Rule cited Articles 18, 36, and 56 of the UCMJ and the President's authority as Commander-in-Chief of the Armed Forces in Article II, § 2, cl. 1 of the Constitution. However, the first of these, Article 18, does not delegate to the President the power to establish aggravating factors, but merely permits a court-martial to impose "any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter," subject to "such limitations as the President may prescribe." 10 U.S.C. § 818. The second, Article 36, authorizes the President to prescribe "[p]retrial, trial, and posttrial procedures, including modes of proof" for courts-martial, "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836.

The third statutory provision, Article 56, does not grant any authority to the President, but rather forbids a court-martial from imposing punishments which "exceed such limits as the President may prescribe[.]" 10 U.S.C. § 856. It makes no mention of the death penalty, although a number of provisions of the UCMJ provide a specific and very different role for the President in capital cases. *See infra* at 16-17. Finally, Article II's Commander-in-Chief provision is unrelated to the President's role in courts-martial, let alone in prescribing the death penalty. By contrast, the Constitution gives to Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," Article I, § 8, cl. 14, pursuant to which it has enacted the UCMJ and a number of amendments to it.

B. The *Curtis* Decisions

Ronnie Curtis was convicted of murder, and the court-martial sentenced him to death, relying on Presidentially-promulgated Rule 1004 to supply the necessary aggravating factors. On appeal, he challenged the President's authority to establish death penalty aggravating factors. By a divided vote, the Navy-Marine Corps Court of Military Review, sitting en banc, rejected this argument. *United States v. Curtis*, 28 M.J. 1074 (1989) (Pet. App. at 260a). The court ruled that death penalty aggravating factors are procedural rather than substantive and thus fall within the congressional delegation to the President of power to prescribe court-martial procedures. *Id.* at 280a-282a, citing 10 U.S.C. § 836 (1982). The court also found that Congress had provided the President with sufficient guidance to limit his discretion in establishing a military death penalty system. *Id.* at 282a-284a. Judge Albertson dissented from this portion of the opinion, reasoning that, even if Congress delegated to the President the authority to establish a military death penalty system, such a delegation was unconstitutional because it was not accompanied by "specific and detailed standards" to guide the President. *Id.* at 338a.

The Court of Military Appeals bifurcated its consideration of the case, resolving systemic challenges to the imposition of the death penalty in the military before considering factual arguments unique to Curtis. Thus, in its initial opinion, the *Curtis* court rejected the argument that the President acted without authority in establishing death penalty aggravators for courts-martial. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) (Pet. App. at 346a). Although the result is clear, the rationale by which the court reached it is difficult to discern.

To begin with, while the drafters of the Executive Order creating Rule 1004 specified three Articles in the UCMJ as sources of the authority to prescribe aggravating factors, the Court of Military Appeals barely mentioned

them, and never attempted to demonstrate how they specifically authorized the President to establish aggravating factors for the death penalty. The court relied heavily on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Pet. App. at 362a-363a), but it specifically abjured any reliance on the President's inherent authority as Commander-in-Chief. *Id.* at 367a n.9. It also discussed at some length this Court's non-delegation opinions, including in particular *Mistretta v. United States*, 488 U. S. 361 (1989), but never pointed to specific statutory language by which to judge this delegation's validity.

Instead, the court upheld Rule 1004 on the theory that Congress did not object to the Executive Order and implicitly approved it when, a year *after* the President issued Rule 1004, Congress enacted a death penalty statute for the crime of espionage, which sets forth three specific aggravating factors and explicitly authorizes the President to prescribe others for that crime only. *See* Pub. L. No. 99-145, § 534(a), 99 Stat. 634 (1985) (codified at UCMJ Art. 106a, 10 U.S.C § 906a). The court observed that "Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial" (Pet. App. at 362a), and that it was "unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action or to curtail the use of capital punishment in courts-martial." *Id.* at 364a. The court also found that the "failure of Congress to complain about the content of [Rule 1004] can be construed to be ratification" (*id.* at 366a), and the "implication" from the passage of the special death penalty provision governing espionage is "that Congress does not consider the President's prescribing 'aggravating factors' to be in diminution of its own legislative power." *Id.* at 367a. Thus, the court said, "we conclude that Congress has — at least, implicitly — delegated this task [of prescribing the aggravating factors] to the President . . . ." *Id.* at 367a n.9.

Satisfied that it had surmounted the statutory issues, the court turned to the constitutionality of the implicit delegation. To find the necessary guidance from Congress, the court again relied on Congress' authorization to the President to prescribe additional aggravating factors for espionage contained in the subsequently-enacted Article 106a. In light of Article 106a's reference to Article 36, the court concluded that "[a]pparently Congress wished the President to look to the 'principles of law' applied in federal criminal cases in determining what should be the 'aggravating factors' for capital cases tried by court-martial." Pet. App. at 368a. The court examined the source of each of the aggravating factors in Rule 1004(c) (*id.* at 368a-374a) in order to support its finding that "they reflect policy expressed by Congress in various statutes — including several punitive articles of the Uniform Code of Military Justice — and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty." *Id.* at 368a. To support its conclusion, COMA suggested that "the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes" (*id.* at 374a), even though Rule 1004 was issued precisely because none of those statutes satisfies the specificity requirement of *Furman*. The court then returned to Article 106a, which it saw as an "approval of the standards which the President theretofore had employed" for all capital offenses covered by Rule 1004. *Id.* at 375a. Because the court found that "Congress not only acquiesced in his performance of this task but also tacitly ratified the 'aggravating factors' when it enacted Article 106a of the Uniform Code," the delegation was proper. *Id.*

SUMMARY OF ARGUMENT

At stake in this case is whether petitioner and seven other members of the armed forces who are currently on

death row were properly sentenced to death for offenses for which Congress never specified the constitutionally-necessary aggravating factors. The court below fundamentally erred when it assumed that Congress had implicitly delegated to the President the power to fill that void and to draw the lines to determine who shall live and who shall die. To exercise that authority involves profound questions that go to the heart of our values as a society, and it should never be assumed that Congress would delegate that solemn responsibility without saying so explicitly.

There are three separate reasons why the President's act had no legal effect, any one of which is sufficient to set aside the death penalty. First, each of the statutes on which the government or COMA has relied is directed at very different aspects of the court-martial process than is deciding the appropriate death penalty aggravators. That is hardly surprising since those statutes were all enacted more than 20 years before *Furman* established the need for such criteria. By contrast, Congress specifically provided for numerous Presidential roles in the court-martial process, including that he approve each execution.

The clearest indication that Congress did not intend to allow the President to supply the missing aggravating factors for death penalty cases generally is that Congress spoke directly to this subject for the crime of espionage a year after the President promulgated Rule 1004. Thus, Article 106a of the UCMJ included three specific criteria under which a person convicted of espionage was eligible for death, and it expressly delegated to the President the power to specify other circumstances warranting the death penalty, *but only for the crime of espionage*. Surely, there would have been no need for Congress to have made that express, but limited, delegation of authority to the President if Congress had already granted him the power elsewhere in the UCMJ.

Second, Rule 1004 is invalid because nothing in the UCMJ or other laws enacted by Congress provides any

intelligible standards to confine the President's power, and hence the delegation, if indeed there is one, runs afoul of the non-delegation doctrine. This case is not like others where the debate has been over whether the standards that Congress has provided are meaningful. Instead, the issue here is whether a delegation can be valid where Congress has been completely silent.

Finally, permitting the President to prescribe the aggravating factors for military death penalty cases would violate fundamental principles of separation of powers by uniting in him the authority to legislate (through Rule 1004), to execute (by selecting the prosecutors, deciding what charges to bring, and making the ultimate ruling on punishment), and to judge (through his control over the appointment, removal, and promotion of military trial and intermediate appellate judges). At the very least, the potential problems created by such an unparalleled concentration of power in one office-holder are further reasons not to construe the general provisions on which the government relies to grant the President the extraordinary power claimed here.

ARGUMENT

THE DEATH PENALTY IMPOSED ON PETITIONER MUST BE SET ASIDE.

I. THE PRESIDENT LACKS THE STATUTORY AUTHORITY TO PROMULGATE AGGRAVATING FACTORS FOR CRIMES COMMITTED BY SERVICE MEMBERS OTHER THAN THE CRIME OF ESPIONAGE.

The first question is whether Congress has authorized the President to prescribe the necessary aggravating factors. Instead of analyzing the language of the three UCMJ Articles that were cited to support Rule 1004, COMA found an

"implicit" delegation springing from congressional inaction, lack of stated displeasure, and inferences drawn from other statutes dealing with related, but different matters. On the basis of this implicit delegation, the court allowed the President to embark on an open-ended, unguided process of deciding those factors which do and which do not warrant imposition of the death penalty for the various military capital offenses.

The UCMJ Generally. The proposition that the UCMJ speaks to this issue at all is highly doubtful since all of the provisions relied on by the government pre-date *Furman* by more than two decades. *See United States v. Woolard*, 981 F.2d 756, 758, *reh. denied*, 990 F.2d 820 (5th Cir. 1993) (rejecting claim that pre-*Furman* statute could satisfy *Furman* mandate). As Judge Fletcher observed in his concurrence in *Matthews*, the notion that Congress actually intended in 1950 to assign these powers to the President "implies that, as a result of overabundant concern for the rights of servicemembers or as a result of mere happenstance, a unique system for imposing the death penalty evolved in the military without regard for civilian practice." 16 M.J. at 385-86.

The implausibility of the government's statutory authorization claim is underscored by the fact that COMA, which is thoroughly versed in the UCMJ, was unable to identify any provision which gave the President this authority. Instead, it concluded that congressional silence in the wake of presidential action was sufficient. But as this Court has made clear, "Congressional inaction cannot amend a duly enacted statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). Nor should congressional silence be construed as endorsement of a regulation issued in the name of a statute. As Justice Scalia forcefully reminds us:

> [O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the failure to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., joined by Rehnquist, C. J. , dissenting). Moreover, in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 958 (1983), this Court held that Congress acts in one way only: by enacting laws that are passed by both Houses and signed by the President or enacted by two-thirds majorities over his veto. Given the enormously sensitive and politically-charged nature of all decisions relating to the death penalty, it would be a total perversion of separation of powers to uphold COMA's "implicit delegation" ruling.

As to the only three specific UCMJ Articles relied on — Articles 18, 36, and 56 — none of them contains an express delegation to do what was done here: supply the constitutionally-required aggravating factors for death penalty cases. Moreover, although the drafters of the Executive Order asserted that these three Articles provided the President authority to supply the required aggravating factors, there is no indication of the basis for that conclusion. Before examining each of these provisions, however, some history on the federal death penalty and how Congress has chosen to deal with it may help to put the question of Congress' asserted intent to delegate this awesome power to the President in perspective.

Each of the three Articles relied on was part of the UCMJ as passed in 1950, 22 years before *Furman* was decided. Of the three, only Article 18 mentions the death penalty, permitting it "when specifically authorized by this chapter." In addition, in 1974, two years after *Furman*, Congress enacted a new federal statute authorizing the death penalty for air piracy cases, 49 U.S.C. § 1473, now recodified at 18 U.S.C. § 3592, but it left the UCMJ untouched. Moreover, when Congress enacted the comprehensive Sentencing Reform Act of 1984, which led to the sentencing guidelines approved in *Mistretta*, it failed to address specifically the question of whether the Sentencing Commission, which plainly had been delegated authority to establish sentencing ranges, including the power to specify aggravating and mitigating factors generally, was empowered to specify the required factors where the substantive statute already authorized the death penalty. 488 U.S. at 378 n.11 (assuming without deciding that the Commission has such authority, but "only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments").

Thus, to find that there was a specific delegation to the President here, this Court must assume that, in 1950, Congress anticipated and satisfied the concerns of *Furman* and provided backup authority for the President to fill in the aggravating factors that the Constitution requires. But there is not a shred of evidence anywhere that Congress gave one minute's thought to endowing the President with those kinds of powers in 1950, nor that anything that it did between then and January 1984 authorized the President to issue the challenged Executive Order. Given the gravity of the death penalty, the extensive debates in Congress about whether to impose it, *see* Establishing Constitutional Procedures for the Imposition of Capital Punishment, S. Rep. No. 282, 99th Cong. 2d Sess. 2-4 (1986), and the absence of any specific language in the UCMJ authorizing the President to supply

those factors, the Court should conclude, without further discussion, that there is no statutory delegation in this case.

Article 18. Article 18 deals with the "jurisdiction of general courts-martial," and it allows a general court-martial to impose any punishment within the limits that the President prescribes, if it is "not forbidden by this chapter [the UCMJ], including the penalty of death when specifically authorized by this chapter." This provision reinforces our contention that Congress wanted to retain control over the use of the death penalty because it limits the death penalty to those cases "specifically authorized by" Congress, with no mention made of any role for the President. *See also infra* at 16-17, discussing other portions of the Code that confirm this analysis.

Article 36. The second provision relied on — Article 36 — authorizes the President to prescribe rules, but only for "pretrial, trial, and posttrial procedures, including modes of proof." On their face, those kind of rules appear to deal with the manner in which a trial is conducted, a conclusion which is supported by the fact that Article 36 is contained in Subchapter VII entitled "Trial Practices," whereas the provisions relating to sentences are in Subchapter VIII, which includes Article 56 discussed below.

Moreover, Article 36 further directs the President "so far as he considers practicable, [to] apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ." Of course, there are no such principles of law or rules of evidence governing the use of aggravating factors in the death penalty in district courts, which further suggests that Article 36 was not intended to delegate to the President the power to determine the appropriate aggravating factors in death penalty cases. The one district judge who tried to fill a similar void, by promulgating aggravating factors needed for the death penalty, was rapidly reversed in *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). Indeed, as the

court of appeals noted in *Harper*, *id.* at 1225-26, it was the Justice Department's position in its briefs there and elsewhere that it was Congress' responsibility, not the courts', to satisfy the requirements of *Furman*. *See also United States v. Woolard*, *supra* (rejecting government's post-*Furman* attempt to obtain death penalty in absence of congressional enactment).

The government's broad reading of Article 36 has also been rejected by COMA in *United States v. Frederick*, 3 M.J. 230, 236 (1977), where it concluded that "the adoption of the standard for mental responsibility is not within the scope of the President's rulemaking powers under Article 36 UCMJ." It held that the question of whether the accused was mentally responsible for his actions was a matter of substantive law that the President could not decide under Article 36. Surely, if an accused's mental state is too substantive to be within the purview of Article 36, then *a fortiori* the choice of which aggravating factors are appropriate before the death penalty is imposed is also beyond the scope of Article 36.

Moreover, *Frederick* was decided in 1977, more than six years before Executive Order No. 12,460 was promulgated, thus giving Congress more than ample time to correct COMA's approach to Article 36 if Congress thought it was in error. Yet Congress did not amend Article 36. Instead, when it eventually addressed the problem in 1986, it simply added new Article 50a, 10 U.S.C. § 850a, that dealt with the issue of mental responsibility directly, and left untouched COMA's conclusion as to the scope of presidential authority under Article 36.

The decision in *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976), and Congress's response to it, further underscore the limited reach of Article 36, and how irrelevant it is to the issuance of aggravating factors in death penalty cases. In *Ware*, in the course of directing dismissal of the charges against an accused, the court suggested, in

dicta, that Article 36, as then written, only authorized the President to issue "procedural guidelines before courts-martial," not after trial. *Id.* at 285 & n.10. Several years later Congress responded by amending Article 36 to make clear that it reached "pretrial, trial, and posttrial" procedures. Pub. L. No. 96-107, 93 Stat. 811, 96th Cong., 1st Sess. (1979); S. Rep. No. 197, 96th Cong., 1st Sess. 123 (1979), *reprinted in* 1979 U.S. Code & Cong. Admin. News 1828-30. This amendment is important because it reflects both a desire to overrule language in an opinion of COMA, but only in a very narrow way, and because, despite the fact that *Furman* had been decided seven years, and *Gregg* three years earlier, there was not a hint that Congress ever envisioned the kind of substantive role for the President that he undertook when he supplied the constitutionally necessary factors for narrowing the class of persons eligible for the death penalty. For all these reasons, Article 36 cannot sustain the power exercised by the President here.

Article 56. Finally, the Executive Order fares no better in reliance on Article 56. That provision simply permits a court-martial to impose punishment which "may not exceed such limits as the President may prescribe for that offense," but does not give the President the power to prescribe the necessary aggravating factors for death penalty cases. The combination of Articles 18 and 56 does permit the President to set maximum limits for punishments within the confines of those already fixed by Congress in the UCMJ. Nonetheless, the question remains, does that power to fix maximum punishments include the power to set aggravating factors for death penalty cases? Aside from the fact that there is no evidence that Congress ever considered conferring that power on the President under Article 56 or any other provision of the UCMJ, there are other provisions of the UCMJ where Congress expressed its intent that either Congress itself, or a court-martial panel, but not the President, should decide important questions relating to the imposition of the death penalty.

The principal reason why Article 56 does not give the President the power to establish aggravating factors by Executive Order is because the Code carefully delineates several roles for the President in capital cases, but those roles do not include issuing rules for aggravating factors. Prior to the passage of Article 106a, 13 UCMJ Articles allowed the death penalty in some circumstances.[1] For some crimes, death may be imposed only in time of war, and for others there are other conditions, but none of those provisions authorizes the President to prescribe when the death penalty may be imposed. Therefore, despite the general power given to the President in Article 56 to prescribe maximum punishments, there is no basis to believe that Congress intended to delegate to him the specific power to decide the relevant factors in death penalty cases, since, as this Court has often remarked, "death is qualitatively different." *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As we now show, this difference is reinforced by other portions of the UCMJ in which Congress decided that the President should have a specific and limited role in the imposition of the death penalty.

The President's role in death penalty cases is expressly mandated by Article 71(a), which provides that a death sentence (and only a death sentence) "may not be executed until approved by the President [who] may commute, remit, or suspend the sentence, or any part thereof, as he sees fit [except that a death sentence] may not be suspended." As

---

[1]Article 85(c) (desertion); Article 90(2) (willful disobedience of a lawful order during wartime); Article 94(b) (mutiny, sedition, or failure to suppress or report a mutiny or sedition); Article 99 (misbehavior before the enemy); Article 100 (attempting to compel surrender); Article 101 (improper use of countersign); Article 102 (forcing a safeguard); Article 104 (aiding the enemy); Article 106 (spying); Article 110(a) (improper hazarding of vessel); Article 113 (misbehavior by sentinel); Article 118 (premeditated murder or certain felony murders); and Article 120(a) (rape).

described by the Senate Armed Services Committee, actions under Article 71(a) do "not involve a review of the legality of the proceedings; rather, they are conducted as a matter of clemency." S. Rep. No. 53, 98th Cong., 1st Sess. 24 (1983). Thus, in death penalty cases, Congress made the President the final reviewer of death sentences, not the promulgator of aggravating factors necessary before the death penalty may be imposed.

It is not simply that Congress did not authorize the President to make these determinations, but in fact it lodged the decisional authority elsewhere. Thus, for spying in time of war in Article 106, U.S.C. § 106, there is a mandatory death penalty, indicating that Congress did not wish anyone else to interfere with that judgment. Similarly, if a person is found guilty of murder under Article 118, either premeditated murder under subsection (1) or felony murder under subsection (4), the person "shall suffer death or imprisonment for life as a court-martial may direct," once again leaving the President out of the process and giving the court-martial members only two choices. And for all the remaining crimes for which the death penalty is available, the punishment is "death or such other punishment as a court-martial may direct."

In our view, the care which Congress has exercised in establishing the locus of decision-making for all death penalty cases makes clear that, despite the President's general power to prescribe maximum punishments, the question whether to impose the death penalty was assigned to the court-martial panel, except where Congress itself specified the penalty. Of course, after *Furman*, leaving the choice to the unguided discretion of a court-martial is unconstitutional, and so another mechanism must be found before the death penalty may again be imposed. But since Congress has consistently taken upon itself to decide the solemn question of life or death, where it has not left it to a court-martial, there is simply no basis to believe that it intended to allow the President to undertake that responsibility. Indeed, when it

explicitly gave him that power in 1985, it did so only for espionage, further supporting our claim that Congress never delegated that power to the President when it enacted the UCMJ in 1950.

Article 106a. The opinion in *Curtis* and the Opposition of the government in this Court argue that the enactment of Article 106a evinces Congress' willingness both to authorize the death penalty and to allow the President to set conditions for doing so. Hence, according to *Curtis*, Article 106a validates what took place nearly two years before it was passed. There are several difficulties with that proposition.

In the first place, Article 106a itself contains the kind of detailed set of aggravating factors which are constitutionally required before the death penalty can be imposed. We do not argue that the addition of those factors alone establishes that Congress did not believe that the President had the authority to prescribe them for espionage. Because the crime of espionage was added to the UCMJ by this very statute, it would have been reasonable for Congress to have wanted to spell out, at the same time, the circumstances where the death penalty was appropriate for that crime.

But more significantly, Congress included in subsection (c)(4) of Article 106a the very explicit delegation to the President to add further aggravating factors "under [Article 36]", a power that the government insists already "implicitly" existed. Surely, there is no basis for concluding that Congress would have believed it necessary to add that provision if it thought that it had already delegated that power to the President in other parts of the UCMJ. The only conclusion that can be drawn is that Congress explicitly delegated this power to the President so that he could include additional factors in espionage cases. But Congress delegated that authority *only* for the crime of espionage, thereby underscoring the absence of Presidential power for all the other crimes for which the death penalty was

statutorily authorized, but for which there were no specific aggravating factors, let alone a specific delegation like that in Article 106a.

In its Opposition (at 12), the government cited one section of the Conference Report on Article 106a which states that the "conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles." H. R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 425 (1985), *reprinted in* 1985 U.S. Code & Cong. Admin. News 579. Similarly, another portion of that Report stated that the original House provision, from which Article 106a was derived, "was not intended to affect the validity of . . . the capital sentencing procedures promulgated by the President in the Manual for Courts-Martial, 1984." *Id.* at 424. According to the government (Opp. at 11), Article 106a "clearly reflects congressional understanding that the UCMJ, including Article 36, gives the President delegated authority to promulgate aggravating factors in capital cases."

Had Congress specifically ratified the prior aggravating factors promulgated by the President, the government's claim might have some force. But Congress did not enact those aggravating factors into law, or even give the President authority to do so on a prospective basis; its conferees simply expressed their "intent." Whatever effect conferees' intent might have in other circumstances, Article 106a is so clear, and its contrast with Articles 18, 36, and 56 so marked, that all of the expressions of intent in legislative history cannot overcome the contrary language of the relevant provisions that Congress actually enacted into law. As this Court observed in *Train v. City of New York*, 420 U.S. 35, 45 (1975), "legislative intention, without more, is not legislation." Stated another way, when Congress wanted to authorize the death penalty, it did so either by providing specific aggravating factors in the substantive statute, or by

explicitly delegating the power to do so to the President. Since it has done both, but only for espionage, and since petitioner was not charged with that offense, there is no statutory authority for the President to promulgate the aggravating factors in Rule 1004.

Other Considerations. Other reasons also counsel against assuming that Congress delegated to the President the power to supply aggravating factors for the crime for which petitioner was sentenced to death. Of the 14 crimes for which death may be imposed under the UCMJ, all but two — murder (premeditated and felony-murder) and rape (which now must result in death for the accused to be death eligible) — are service-connected offenses. By contrast, murder and rape are crimes for which any person may be charged and tried by the jurisdiction where the offense occurred. But to be eligible for trial by a court-martial under the UCMJ, the victim need not be in the Armed Forces, nor a dependent or otherwise related to either the accused or the military. *Solario v. United States*, 483 U.S. 435 (1987). Nor must the crime be committed on military premises, or for that matter, even in the United States. And the petitioner would have been eligible for the death penalty even if the alleged murder occurred in a state that has no death penalty. There is, of course, not a hint that Congress ever considered whether servicemen and women should be treated differently from civilians in the place where the crime was committed for crimes that have nothing to do with service in the military. Thus, the unintended usurpation of local law, based solely on the three cited Articles of the UCMJ relied upon for the Executive Order, is another reason why the Court should not assume that Congress intended to delegate this awesome power to the President.

For all these reasons, there is no basis for concluding that Congress intended to give the President the power to decide those aggravating factors that are sufficiently serious to warrant the death penalty. None of the provisions relied on was intended to deal with that subject, which was an

unknown area of the law when they were enacted as part of the original UCMJ in 1950. Moreover, because of Congress' specific decisions in Article 106a, including a limited but express delegation to the President, as well as Congress' general treatment of the death penalty in a way that is inconsistent with presidential authority to decide when it will be imposed, none of the authorities relied on supports the Executive Order's promulgation of aggravating factors necessary to support the death penalty in this case.

The issue is not, as the government urged in its Opposition (19-20), whether the power exercised by the President here is "a reasonable adjunct to his authority to regulate courts-martial," nor whether "the President should have the authority to promulgate sentencing procedures, including aggravating factors for capital or noncapital cases," nor whether Congress "could have believed that the President is in a better position to determine what factors are necessary to ensure adequate military discipline." Rather, the issue is whether Congress ever gave him that authority, and on that issue all of the evidence leads to the conclusion that it did not.

II. ANY DELEGATION HERE VIOLATES THE NON-DELEGATION DOCTRINE.

If the Court concludes that there was a statutory delegation to the President, it must then decide whether there is an "intelligible principle" in the delegation by which the President's discretion can be confined. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). What makes the delegation ruling in *Curtis* so remarkable is that the court was unable to point to a single word in any statute from which the constitutionally required "intelligible principle" could be derived.

An examination of this Court's most recent delegation cases in the criminal law area makes clear how far this case is from meeting the constitutional standards. For instance,

in *Mistretta*, *supra*, the Court spent more than four pages examining what Congress had done in the statute to provide guidance, pointing out that there were "three goals," 488 U.S. at 374, a "specific tool" for carrying out those goals, a requirement of a "system of 'sentencing ranges' applicable for each category of offense involving each category of defendant," which included maximum amounts of the ranges, and a requirement that the Commission "use current average sentences 'as a starting point.'" *Id.* at 375. Congress also required the Commission to consider "seven factors" in establishing its offense categories and "11 factors" in establishing the categories of defendants. *Id.* at 375-76. It further "enumerated various aggravating and mitigating circumstances . . . to be reflected in the guidelines" (*id.* at 377), and made a number of other specific determinations that prevented the Commission from simply going off on its own and doing what it thought best. Plainly, there is nothing remotely resembling that kind of congressional guidance or limitation on Presidential discretion in any of the statutes relied on to support this Executive Order.

Similarly, in *Touby v. United States*, 500 U.S. 160 (1991), a challenge was made to the Attorney General's temporary addition of controlled substances to the existing schedules, which was necessary in order to act quickly to ban newly-created drugs with only slightly different formulas from drugs already on those schedules. The statute allowed such additions "to avoid imminent hazard to the public safety," and the petitioner conceded that the intelligible principle requirement had been met because the statute "meaningfully constrains the Attorney General's discretion to define criminal conduct." *Id.* at 166. The Court found that Congress had placed "multiple specific restrictions on the Attorney General's discretion to define criminal conduct," *id.* at 167, and it noted that, although there was no direct judicial review of interim additions for compliance with the statute, the government had conceded that there would be such review as a defense to a criminal action in order to

"ascertain whether the will of Congress has been obeyed." *Id.* at 168-69 (citations omitted); *see also id.* at 170 (Marshall and Blackmun JJ., concurring: judicial review assures "that the exercise of [delegated] power remains within statutory bounds"). By contrast here, it would be impossible to determine whether the will of Congress has been obeyed because Congress has not said a word on the subject of aggravating factors, other than in the espionage context, which is plainly irrelevant to this case.

In upholding the delegation in *Curtis*, COMA relied on federal statutes, state statutes, and the Model Penal Code for sources of aggravating factors and for its conclusion that "the President was not set adrift in an uncharted sea." 32 M.J. at 267 (Pet. App. at 375a). The problem with this analysis is not that the President had no charts, but that he had too many. Of course, the President "can take [the] judgments" that Congress made in other statutes into account, but under the delegation doctrine, the question is whether he *must* do so, or is he free, as he was here, to adopt whatever aggravating factors he preferred.

In fact, other than for air piracy (which is not even covered by the UCMJ), there were no other federal statutes in 1984 containing aggravating factors. Moreover, even if there were some basis for concluding that Congress intended the President to rely on non-federal sources, there was nothing approaching unanimity among state statutes and the Model Penal Code on which the President could be said to have drawn in drafting Rule 1004. While we doubt that a delegation that said "pick among existing statutes and the Model Penal Code as you choose" would be sufficient, the delegation here does not even approach that level of specificity since nothing in the UCMJ or elsewhere even purports to constrain the President's choices. Indeed, the reliance on the Model Penal Code and state statutes by the *Curtis* court and the government in its Opposition (at 15-16) is particularly problematic as applied to death penalties under the UCMJ since 11 of the 13 offenses covered by Rule 1004

are entirely military and have no civilian counterparts. *See* note 1 *supra*.

In its Opposition, the United States placed particular emphasis on Article 36 and its requirement that the President "apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts" to supply the necessary guidance (Opp. at 15-16). Of course, Article 36 can supply the needed "intelligible principle" only if, in fact, it and not some other part of the UCMJ is the statutory basis for issuing Rule 1004. However, as demonstrated above, Article 36 is quite a narrow grant of authority, and even its limited guidance cannot be read into the other Articles on which *Curtis* and the government rely.[2]

Moreover, there are no "principles of law" governing the issuance of aggravating factors for death penalty cases "generally recognized" in district courts of the United States in the "trial of criminal cases" there. As both *Harper* and *Woolard*, *supra*, at 13-14, make clear, the function of establishing aggravating factors is not one for courts, but for Congress. Nor does this Court's approval in *Gregg* and other cases of a wide variety of state legislative enactments constitute the necessary "principles of law" that are required by Article 36, as the government urged in its Opposition (at 15-16). The fact that this Court may find a state statute

---

[2]Assuming *arguendo* that the government is correct that the standards for delegation are relaxed where the delegee already has delegated authority "in this area" (Opp. at 14), the question remains whether Congress has delegated to the President *any* authority to prescribe aggravating factors in death penalty cases for the military. The government's argument appears to be based on the notion that, because the President has a significant role in some aspects of courts-martial, the "area" or, as the Opposition subsequently puts it in that same sentence, "the subject matter" of the President's overall authority regarding courts-martial is the same as issuing Rule 1004, which it is not.

consistent with the Eighth Amendment does not make its decision a "principle of law" governing the "trial of criminal cases" in federal district courts within the meaning of Article 36, especially in light of the "rules of evidence" phrase which immediately follows "principles of law" and which further emphasizes the limited reach of Article 36.

Another factor, prominent in *Mistretta* as well as other cases, is wholly absent here. In most delegation cases, the Court has been loath to question Congress' judgment that, because the task at issue was very complex and required constant monitoring, it was practically impossible for Congress to take on the responsibility. Justice Blackmun's opinion in *Mistretta*, particularly at pages 372 and 379, makes it clear that to insist that Congress decide all of these questions would have been unworkable and would have made sentencing guidelines a practical impossibility. Plainly, that is not the problem here, for there are only a few crimes for which death is authorized in the UCMJ, and none of the states that have chosen to reinstate the death penalty after *Furman* encountered the kind of practical problem that was so significant in *Mistretta*. Indeed, Congress has recently done this for all federal death penalty offenses except those in the UCMJ. 18 U.S.C. § 3592. Whatever force the necessity argument may have in other contexts, it is unavailing here, even assuming that Congress ever intended to delegate to the President the power to decide which aggravating factors are appropriate for which offenses. At the very least, the substantial constitutional doubt on the issue of whether the "implicit delegation" was overbroad should give the Court further pause on the statutory issue raised in Point I, on which we principally rely.

III. THE DELEGATION ALSO VIOLATES SEPARATION OF POWERS.

There is a final constitutional difficulty which, like the preceding problem, strongly counsels against finding an

existing delegation. This problem involves uniting in the Executive Branch the power both to prosecute death penalty cases and to decide which categories of offenses shall be subject to that penalty. It is a basic principle of separation of powers that the Congress shall write the laws, the Executive shall implement the laws, and the Judiciary shall interpret the laws. *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). Here, however, it is the President alone who is both deciding what the law shall be — who shall be subject to the death penalty — and implementing the law in his role as Commander-in-Chief, with ultimate responsibility for the prosecution of all offenses and review of all death penalty sentences. *See* Article 71(a). Yet it is precisely this kind of blending of functions — with no meaningful checks on the President's discretion — that separation of powers precludes.

This concern over uniting the power of the President and the sentencing authority was recognized in *Mistretta* as one reason why Congress had placed the Sentencing Commission in the Judicial Branch, and why it would have been improper for Congress to make the Commission part of the Executive Branch. In that event, according to the Court, the Sentencing Commission "might [have] unconstitutionally united the power to prosecute and the power to sentence within one Branch." 488 U.S. at 391 n.17. Indeed, in deciding to put the Sentencing Commission in the Judicial rather than the Executive Branch, the House of Representatives expressed this very concern:

> Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 98-1017, 98th Cong., 2d Sess. 95 (1984).

This concern is not of recent vintage. Thus, in *Reid v. Covert*, 354 U.S. 1, 39 (1957), in finding that the military could not constitutionally try dependents in a court-martial, the Court expressed concern about the substantive role of the President as one of the reasons for not permitting it: "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." And in *United States v. Brown*, 381 U.S. 437, 443 (1965), a bill of attainder case, this Court observed that separation of powers was "looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will." Similarly, in *Trop v. Dulles*, 356 U.S. 86 (1958), at least one of the concerns underlying the decision — that desertion in time of war should not cause an American citizen to lose his citizenship — was the broad discretion given to the military to decide "who among convicted deserters shall continue to be Americans and who shall be stateless." *Id.* at 90; *see also id.* at 104-05 (Black and Douglas, JJ., concurring). Finally, in *United States v. Harper*, *supra*, the Ninth Circuit concluded that "specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people. . . [and t]he conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable." 729 F.2d at 1225.

This problem is greatly magnified in the military. Because the President is the Commander-in-Chief, he and his subordinates not only decide the law for death penalty crimes and prosecute those cases, but also have ultimate control over the judges who try these cases and hear the appeals, since those judges are selected for their positions by the Judge Advocates General of their Armed Service, who are ultimately responsible to the President. *See Weiss v. United*

States, 114 S. Ct. 752 (1994). Moreover, the President is the ultimate superior of all convening authorities for all courts-martial, and it is those convening authorities who decide what charges to bring against an accused and have other significant duties in connection with a court-martial. *See* Opposition at 7 n.3 (setting forth extensive powers of convening authority). Furthermore, pursuant to Article 71(a), 10 U.S.C. § 871(a), the President alone has the power to order that a death sentence be carried out or commuted.

To allow the President to fill the aggravating factors vacuum would be to assign to the superior of the prosecutor the power to decide the circumstances under which an accused may live or die. The Framers were very concerned about uniting in one person the power to both write the laws and execute them, *The Federalist* No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961), as was Congress when it decided to place the Sentencing Commission in the Judicial and not the Executive Branch. S. Rep. No. 98-225, 98th Cong., 1st Sess. 159 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3342. Even if such a joinder did not violate separation of powers, the Court should not assume that Congress intended such a blending of functions in the President unless there is the clearest language authorizing it. Again, we do not ask the Court to decide this constitutional question unless it is absolutely necessary, but its very existence counsels against finding a valid delegation. *See generally Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *id.* at 223-25 (O'Connor, J., dissenting).

The presumption against concentration of powers is especially strong here because the Framers were so careful to divide the responsibility for military affairs between the President and Congress. Thus, Article II, § 2 makes the President the Commander-in-Chief, but the Framers gave Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, cl. 14. This quite specific division of power, beyond that embodied in the basic separation of powers doctrine,

suggests a special concern about uniting executive and legislative power in the military context and thereby undermines *Curtis*' reliance on the President's inherent authority as Commander-in-Chief (Pet. App. 361a-362a). To be sure, as the Opposition argues (at 16-17), there has been an historic sharing of sentencing between the legislative and executive branches, but as footnote 6 on page 17 of the Opposition makes clear, the executive's role has been carried out by a court-martial panel in capital cases, and not by the President. *See also supra* at 16-17 (describing separate roles for President and court-martial in death cases). And it is clear after *Furman* that the wide-ranging discretion of courts-martial to impose or withhold the death penalty cannot be sustained under the Eighth Amendment.

In light of the heightened scrutiny which the Eighth Amendment compels where the death penalty is involved, even the most explicit delegation, coupled with carefully drawn standards, would raise serious constitutional issues. Such issues can be avoided by construing Articles 18, 36, and 56 narrowly, thus denying the President the life and death power to promulgate the aggravating factors needed to reactivate the death penalty in the military. Identifying those factors which may place a defendant's life in the balance is precisely the kind of decision that has traditionally been made by legislative bodies who are most responsive to the will of the people, and not by a single executive, with no checks and balances on the process by which he decides those questions.

CONCLUSION

For the foregoing reasons, the sentence of death imposed against petitioner should be set aside.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
1600 Twentieth Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Eugene R. Fidell
Feldesman, Tucker, Leifer,
Fidell & Bank
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

Attorneys for *Amicus Curiae*
Public Citizen, Inc.

November 9, 1995